IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

WILLIAM CARMICHAEL, ET AL.,
vs.
FRANCIS X. EBERLE.
No. 166.

IN ERROR TO AND APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

This is a suit in ejectment brought in the District Court for the County of Socorro, in the Territory of New Mexico. On the trial of the case, the jury, under instructions of the Court, returned a verdict in favor of the defendants. One of the defendants, Adam Hug, consented to judgment against him for the interest he claimed, one-sixth, in the claims. Judgment was accordingly entered in the District

Court in favor of the other defendants for two mining claims, called the Lexington and Andrew Jackson. (Transcript, folios 21 to 26.) Thereupon Eberle, the plaintiff below, sued out a writ of error to the Supreme Court of the Territory.

On the first hearing in that Court, the Court rendered an opinion and entered judgment reversing the cause, and remanding it for a new trial. One of the three judges who heard the case dissented. (For judgment see transcript, folio 28; for opinion folios 36 to 46 inclusive.) Thereupon defendants in error in that Court filed a petition for a rehearing. The prayer of this petition we insist was granted, and the cause reheard. Upon this rehearing the Court was equally divided. Two of the four judges who participated in the rehearing being for affirmance of the judgment of the District Court, and two for reversal. Nevertheless, the Court rendered a second judgment reversing the District Court and remanding the cause for a new trial. It is this judgment of which we complain.

As there was some doubt as to whether a review could be had by appeal, the case having been originally tried in the District Court by a jury, we have brought it here both by error and appeal.

ASSIGNMENT OF ERRORS.

Come now the appellants and plaintiffs in error in the above entitled cause, and assign for error, committed by the Supreme Court of New Mexico, the following:

First—The Court erred in rendering judgment in favor of the the plaintiff in error in that Court, and reversing the District Court when the Court was equally divided.

Second—The Court erred in overruling the motion of defendants in error in the Court below, to make an entry ***nunc pro tunc***, showing in accordance with the facts, that a rehearing was granted.

Wherefore, appellants and plaintiffs in error pray that said judgment reversing said cause be reversed and in all things held for naught, and that a judgment affirming the judgment of the District Court be entered in said cause.

W. B. CHILDERS,
Attorney for Plaintiffs in Error and Appellants.

AUTHORITIES.

I.

The petition for rehearing was granted and a rehearing had. The motion for a rehearing was filed during the term of the Court, supported by brief in

accordance with the rule of Court. No oral argument could be had unless a rehearing was granted.

Rule XXII of the Supreme Court of N. M. (1894), which was then in force is as follows:

"A petition for rehearing after judgment can be presented only at the term at which judgment is entered, unless by special leave granted during the term, and must be printed and briefly and distinctly state the grounds and be supported by certificate of counsel; and will not be granted or permitted to be argued unless a justice who concurred in the judgment desires it and the majority of the Court so determines. Such petition shall be considered by the Court without oral argument, but may be supported by a printed brief."

The docket entry (transcript, folio 33) reads that "this cause coming on for hearing upon the motion of said defendants in error, heretofore filed herein, for a rehearing, the same is argued, &c.," submitted to the Court and taken under advisement. The rule does not permit the argument of the question as to whether a rehearing shall be granted. The argument, if any is permitted, is upon the question raised by the motion for rehearing.

The next entry is the judgment of reversal. This entry recites that the cause has been argued "upon the motion of said defendants in error for a rehearing of said cause *granted herein at a former term*,

the Court being now sufficiently advised in the premises, announces its decision by Associate Justice Collier, Chief Justice Smith concurring, Associate Justices Laughlin and Bantz dissenting, *reversing the judgment of the Court below*, and remanding said cause for a new trial, for reasons stated in the opinion of the Court on file herein." The judgment does not overrule the motion for a rehearing; it hears the cause and reverses it. The Court then enters a second judgment reversing the Court below. (Transcript, folios 33 and 34.)

The second opinion of the Court recites that the petition for rehearing was allowed. It says: "The petition for rehearing in this case was allowed for the purpose of reargument upon the proposition that a parol agreement for the acquiring of an interest in a mining claim in New Mexico was within the Statute of Frauds, and therefore void." (Transcript, folio 48.) Two Judges concur in this opinion, and two dissent. (Folio 52 of transcript.)

It seems perfectly clear, therefore, that there was a rehearing, and that the first judgment of reversal was thereby set aside, and that a judgment of reversal was entered upon an equal division of the Court. It must have been, because the Court deemed that the facts were shown with sufficient clearness that the

motion to enter an order *nunc pro tunc*, showing the granting of the rehearing was overruled.

II.

The granting of a motion for rehearing, and hearing the cause anew, is equivalent to setting aside the first judgment.

Memphis vs. Brown, 94 U. S., 715.

Brockett vs. Brockett, 2 How., 241.

III.

On the rehearing the Court was equally divided as to reversal or affirmance. This affirmed the judgment of the District Court.

"It is settled that when this Court is equally divided upon a writ of error or appeal, the judgment of the Court below stands affirmed."

The Washington Bridge Co. vs. Stewart, 2 How., 413.

So, also, on an equal division in another case, the Court said, "upon this division the judgment of the Court below is necessarily affirmed."

Benton vs. Woolsey, 12 Peters, 27.

See also,

Hemenway vs. Fisher, 20 How., 255.

Bauer vs. T. & P. R. R. Co., 131 U. S., 430.

Strout vs. Foster, 1 How., 80.

Ellis vs. Jones, Id., 197.

Albany Bridge Case, 2 Wall., 403.

Compiled Laws of New Mexico (1897) Sec. 884.

IV.

The Court should have sustained the motion to enter an order granting the prayer of the petition for a rehearing. As already shown, the rehearing was granted and was actually had.

V.

It cannot successfully be contended that the judgment of the Supreme Court was merely an order granting a new trial and therefore not reviewable. It purports on its face to be the reversal of a judgment in favor of the defendant. The writ of error was not sued out to the action of the Court in refusing a new trial, but to review alleged errors of law which took place on the trial. The granting or refusing a new trail is not the subject of review by the Supreme Court of New Mexico. In Coleman vs. Bell, 4 N. M., 28, it is said:

"A motion for a new trial in the Federal Courts is a motion addressed to the discretion of the Court, and the decision of the Court, in granting or refusing it, alone is not the proper subject of a bill of exceptions."

Citing,

Henderson vs. Moore, 5 Cranch, 11.

McLanahan vs. Universal Ins. Co., 1 Peters, 183.

U. S. vs. Buford, 3 Peters, 32.

Bow vs. Gratz, 4 Wheat., 213.

Brown vs. Clark, 4 How., 4.

"The universal rule of practice is that matters resting entirely in discretion are not re-examinable in the Court of errors."

Citing,

Pomeroy vs. Bank of Indiana, 1 Wall., 592.

Rosenthal vs. Chisum, 1 N. M., 633.

Springer vs. U. S., 102 U. S., 586.

Coleman vs. Bell, 4 N. M., 28.

"The granting or refusing a new trial is a matter resting in the sound discretion of the trial judge to whom it is addressed, and it is not reversible unless it shall plainly appear that such discretion has been grossly abused, and that does not here appear."

U. S. vs. Biena, 8 N. M., 105;

Citing,

Territory vs. Romero, 2 N. M., 474.

Archibeque vs. Miera, 1 N. M., 160.

Territory vs. Webb, Id., 160.

Coleman vs. Bell, 4 N. M., 21, and cases there cited.

This has always been and still is the rule in New Mexico. The distinction is clearly pointed out in Sparrow vs. Strong, 4 Wallace, 584. The Court refused to review a case where a writ of error was sued out to the action of the Court in refusing to grant a new trial. The Court held that the only matter brought up for review was the order refusing to grant a new trial, and which was reviewable by the Supreme Court of Nevada, but was not reviewable by this Court. The decision plainly holds that if the judgment of the Supreme Court of the Territory had been on the merits, it would have been the subject of review in this Court.

Sparrow vs. Strong, 4 Wall., 584.

VI.

This Court can enter here a proper judgment affirming the judgment of the District Court. In any event it will remand the case to the Supreme Court of the Territory with instructions to enter a judgment affirming the judgment of the District Court.

Respectfully submitted,

W. B. CHILDERS,

Attorney for Plaintiffs in Error and Appellants.